

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

Sandra L. Senger,  
Plaintiff,

Civil No. 04-1062-AA  
OPINION AND ORDER

vs.

JO ANNE B. BARNHART,  
Commissioner of Social Security,  
Defendant.

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1 AIKEN, Judge:

2 Claimant, Sandra Senger, brings this action pursuant to  
3 the Social Security Act (the Act), 42 U.S.C. § 405(g), to  
4 obtain judicial review of a final decision of the Commissioner.  
5 The Commissioner denied the plaintiff's application for  
6 Supplemental Security Income (SSI) under Title XVI of the  
7 Social Security Act. 42 U.S.C. §§ 1381-83(f). For the reasons  
8 set forth below, the Commissioner's decision is reversed and  
9 remanded for payment of benefits.

#### 10 PROCEDURAL BACKGROUND

11 The plaintiff protectively applied for Supplemental  
12 Security Income on August 3, 2001, alleging disability as of  
13 June 15, 2001. Tr. 15, 88-90. She alleged disability due to  
14 hepatitis C, bipolar II disorder, a heart condition with mitral  
15 valve prolapse and a pacemaker, pain, and fatigue. Tr. 16, 96,  
16 102. Additional impairments have since been added. Tr. 16.  
17 The plaintiff's application was denied initially and on  
18 reconsideration. Tr. 15, 31, 38. A hearing was held before an  
19 Administrative Law Judge (ALJ) on July 30, 2003, and a  
20 supplemental hearing was held on December 9, 2003. Tr. 15,  
21 897-935, 936-954. The ALJ denied the plaintiff's application,  
22 ruling that the plaintiff was not disabled because she could  
23 work as a document microfilmer or as a plastic extruder machine  
24 operator. Tr. 15-27. The Appeals Council denied the  
25 plaintiff's request for review, making the ALJ's decision the  
26 final decision of the Commissioner. Tr. 6-8. See 20 C.F.R. §§  
27 404.210, 416.1481.

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1 activity by reason of any medically determinable physical or  
2 mental impairment which can be expected . . . to last for a  
3 continuous period of not less than 12 months. . . ." 42 U.S.C.  
4 § 423(d)(1)(A).

5 The Secretary has established a five-step sequential  
6 process for determining whether a person is disabled. Bowen v.  
7 Yuckert, 482 U.S. 137, 140 (1987); 20 C.F.R. §§ 404.1502,  
8 416.920. First the Secretary determines whether a claimant is  
9 engaged in "substantial gainful activity." If so, the claimant  
10 is not disabled. Yuckert, 482 U.S. at 140; 20 C.F.R.  
11 §§ 404.1520(b), 416.920(b).

12 In step two the Secretary determines whether the claimant  
13 has a "medically severe impairment or combination of  
14 impairments." Yuckert, 482 U.S. at 140-41; see 20 C.F.R.  
15 §§ 404.1520(c), 416.920(c). If not, the claimant is not  
16 disabled.

17 In step three the Secretary determines whether the  
18 impairment meets or equals "one of a number of listed  
19 impairments that the Secretary acknowledges are so severe as to  
20 preclude substantial gainful activity." Id.; see 20 C.F.R.  
21 §§ 404.1520(d), 416.920(d). If so, the claimant is  
22 conclusively presumed disabled; if not, the Secretary proceeds  
23 to step four. Yuckert, 482 U.S. at 141.

24 In step four the Secretary determines whether the  
25 claimant can still perform "past relevant work." 20 C.F.R.  
26 §§ 404.1520(e), 416.920(e). If the claimant can work, she is  
27 not disabled. If she cannot perform past relevant work, the  
28 burden shifts to the Secretary.

1 In step five, the Secretary must establish that the  
2 claimant can perform other work. Yuckert, 482 U.S. at 141-42;  
3 see 20 C.F.R. §§ 404.1520(e) & (f), 416.920(e) & (f). If the  
4 Secretary meets this burden and proves that the claimant is  
5 able to perform other work which exists in the national  
6 economy, she is not disabled. 20 C.F.R. §§ 404.1566, 416.966.

7 In the plaintiff's case, the ALJ found at step one that  
8 the plaintiff had not engaged in substantial gainful activity  
9 since her alleged disability onset date. Tr. 26, Finding 1.  
10 This finding is not in dispute.

11 At step two, the ALJ found that the plaintiff had a  
12 "vertebrogenic impairment," osteoarthritis, reactive airway  
13 disease, inactive hepatitis C, "some degree of diabetes,"  
14 depression, anxiety, and personality disorders, and "an  
15 extensive history of substance abuse." Tr. 17, 26, Finding 2.  
16 This finding is not in dispute. However, the plaintiff argues  
17 that she has additional severe impairments.

18 At step three, the ALJ found that the plaintiff's  
19 impairments did not meet or equal the requirements of a listed  
20 impairment. Tr. 26, Finding 3. This finding is in dispute.

21 The ALJ determined that the plaintiff had the residual  
22 functional capacity to perform light work with the limitation  
23 of occasional use of ladders, ropes, scaffolds, stooping,  
24 kneeling, crouching, and crawling. Tr. 24, 26, Finding 6. The  
25 ALJ also determined that the plaintiff was capable of one, two,  
26 and three step instructions and tasks, with moderate  
27 limitations on the ability to: understand and remember detailed  
28 instructions, carry out detailed instructions, maintain

1 attention and concentration for extended periods, and interact  
2 appropriately with the general public. Tr. 24, 26, Finding 11.  
3 These findings are in dispute.

4 At step four, the ALJ found that the plaintiff was not  
5 able to perform her past relevant work. Tr. 24, 26, Finding 7.  
6 This finding is not in dispute.

7 At step five, the ALJ found that, based on the above  
8 residual functional capacity, the plaintiff could perform work  
9 existing in significant numbers in the national economy;  
10 specifically noting the positions identified by the vocational  
11 expert: document microfilmer and plastic extruder machine  
12 operator. Tr. 25-27, Finding 12. This finding is in dispute.

13 The plaintiff alleges that the ALJ erred by improperly  
14 rejecting the treating and examining physician's opinions,  
15 failing to consider her combined impairments at step three,  
16 improperly finding some of her impairments non-severe,  
17 improperly rejecting the plaintiff's testimony, and reaching  
18 unsupported conclusions in steps four and five.

#### 19 DISCUSSION

20 The plaintiff argues that the ALJ's rejection of the  
21 opinions of the plaintiff's treating physicians is not supported  
22 by substantial evidence and is based on improper legal standards.  
23 The defendant argues that the ALJ properly evaluated the medical  
24 evidence and supported this evaluation with specific and  
25 legitimate reasons; therefore, the ALJ's rejection of the  
26 opinions of the plaintiff's treating physicians is proper and  
27 should be affirmed.

28 Treating physicians are employed to cure and have greater

1 opportunity to know and observe their patients; as such their  
2 opinions are given greater weight than opinions of other  
3 physicians. Rodriguez v. Bowen, 876 F.2d 759, 761-62 (9<sup>th</sup> Cir.  
4 1989). However, an ALJ "need not accept a treating physician's  
5 opinion that is conclusory and brief and unsupported by clinical  
6 findings." Batson v. Comm'r. of Soc. Sec. Admin., 359 F.3d 1190,  
7 1195 (9<sup>th</sup> Cir. 2004). The ALJ may reject the contradicted medical  
8 opinions of treating physicians if the ALJ "makes findings  
9 setting forth specific and legitimate reasons for doing so that  
10 are based on substantial evidence in the record." Magallenes v.  
11 Bowen, 881 F.2d 747, 751 (9<sup>th</sup> Cir. 1989). Substantial evidence  
12 may include a non-examining physician's opinion if the opinion is  
13 consistent with other independent evidence in the record. Lester  
14 v. Chater, 81 F.3d 821, 830-31. (9<sup>th</sup> Cir. 1996). However, the  
15 opinion of a non-examining physician "cannot by itself constitute  
16 substantial evidence that justifies the rejection of the opinion  
17 of either an examining physician or a treating physician."  
18 Lester, 81 F.3d at 831; see also, Gallant v. Heckler, 753 F.2d  
19 1450, 1456 (9<sup>th</sup> Cir. 1984).

#### 20 1. Dr. Nolan's Opinion

21 The plaintiff contends that the ALJ improperly rejected the  
22 opinion of Dr. Nolan, one of the plaintiff's treating physicians.  
23 Specifically, the ALJ rejected Dr. Nolan's opinion that  
24 plaintiff's back pain is substantial enough to limit her activity  
25 and mandate frequent breaks. Tr. 18. The ALJ's basis for  
26 rejecting this opinion was that "Dr. Bruton testified that the  
27 balance of the record and additional testing indicate that the  
28 claimant is capable of much more" than the functional capacity

1 described by Dr. Nolan. Id. The defendant argues that the ALJ  
2 correctly rejected Dr. Nolan's opinion because it is not  
3 supported by objective evidence in the record and because  
4 plaintiff's back pain had improved.

5 An examination of the plaintiff's medical record shows that  
6 there is considerable objective evidence supporting Dr. Nolan's  
7 opinion as to the degree of plaintiff's back pain. The plaintiff  
8 had previously undergone four back surgeries to remedy her back  
9 problems. Tr. 386. The plaintiff had also sought treatment and  
10 diagnosis for her continuing back pain since those surgeries. A  
11 lumbar CT scan in 2000 revealed mild spinal stenosis at L3-4,  
12 post-surgery and degenerative changes at L4-5, and post-surgical  
13 and degenerative changes at L5-S1 with possible bilateral neural  
14 foraminal narrowing. Tr. 283. A lumbar diagnostic image in  
15 April 2001 showed degenerative changes in her lower lumbar spine  
16 with "marked narrowing" at L4-5. Tr. 327. In October 2001 the  
17 plaintiff went to the emergency room for back pain, and had an  
18 MRI which showed grade 1 spondylolisthesis<sup>1</sup> and spondylitic  
19 changes. Tr. 629. A lumbar x-ray in December 2001 showed  
20 degenerative joint and postoperative changes as well as loss of  
21 disc space from L4 to S1 with anterior spondylolisthesis of L4 on  
22 L5. Tr. 449. These medical findings constitute objective  
23 evidence supporting Dr. Nolan's opinion of the severity and  
24 impact of plaintiff's back pain, contradicting defendant's  
25 contention that Dr. Nolan's opinion was unsupported.

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27 <sup>1</sup>Spondylolisthesis is "forward slippage of a lumbar vertebra on  
28 the vertebra below it." National Institutes of Health, MedlinePlus  
Medical Encyclopedia, at  
<<http://www.nlm.nih.gov/medlineplus/ency/article/001260.htm>>.



1 In addition to arguing a lack of objective evidence  
2 supporting Dr. Nolan's opinion, defendant reiterates Dr. Bruton's  
3 opinion that plaintiff's back pain "must have cleared up" because  
4 there was no mention of it at a physical in December 2001.  
5 Defendant's Brief p. 10, Tr. 915. However, in January 2002, the  
6 plaintiff was "markedly tender in the lumbar spine on exam,  
7 particularly at L5-S1." Tr. 656. Furthermore, in January 2003  
8 Dr. Nolan twice noted back pain. Tr. 844. These more recent  
9 episodes of back pain indicate that plaintiff's pain had not  
10 ceased by December 2001, and contradict defendant's claim that it  
11 should not be a basis for rejecting Dr. Nolan's opinion as to  
12 plaintiff's limitations.

13 In rejecting Dr. Nolan's opinion, the ALJ relied on Dr.  
14 Bruton's testimony and argued there was a lack of objective  
15 evidence to support the opinion. While an ALJ "need not accept  
16 a treating physician's opinion that is conclusory and brief and  
17 unsupported by clinical findings[,] " Dr. Nolan's opinion was  
18 supported by the long list of objective evidence regarding  
19 plaintiff's back pain and the fact that the plaintiff's back pain  
20 had not improved. Batson, 359 F.3d at 1195. The opinion of a  
21 non-examining physician "cannot by itself constitute substantial  
22 evidence that justifies the rejection of the opinion of either an  
23 examining physician or a treating physician." Lester, 81 F.3d at  
24 831. Therefore, the ALJ erred in basing his rejection of Dr.  
25 Nolan's opinion on Dr. Bruton's testimony.

26 For the above reasons, the ALJ erred in rejecting Dr.  
27 Nolan's opinion that plaintiff's back pain limits her activity  
28 and mandates frequent breaks.

1       2.   Dr. Taylor's Opinion

2           The plaintiff also contends that the ALJ erred in rejecting  
3   the opinion of Dr. Taylor, the plaintiff's psychiatrist. The ALJ  
4   rejected Dr. Taylor's opinion that the plaintiff's mental  
5   impairments would likely keep her from sustaining full-time work  
6   because "[Dr. Taylor] bases this assessment on four contacts with  
7   the claimant" and the opinion "does not cover the appropriate  
8   factors involved in determining disability, is a function  
9   reserved to the Commissioner, and is contradicted by his  
10   discussion of work which might be appropriate for the claimant in  
11   several months." Tr. 23.

12          The fact that the plaintiff visited Dr. Taylor only four  
13   times does not mandate that Dr. Taylor's opinion be rejected,  
14   especially in light of the fact that the ALJ credited the opinion  
15   of Dr. Patti, who never examined the plaintiff. Also, many  
16   people in plaintiff's economic position do not have the option of  
17   consistency with their health care providers, and the plaintiff  
18   should not be penalized for this fact.

19          The ALJ also rejected Dr. Taylor's opinion because the ALJ  
20   asserted that the opinion did not cover the appropriate factors  
21   involved in determining disability. The appropriate factors for  
22   physicians to use are: 1) activities of daily living; 2) social  
23   functioning; 3) concentration, persistence, or pace; and 4)  
24   episodes of decompensation. 20 C.F.R. § 416.920a(c)(3). Dr.  
25   Taylor used two of these factors in offering his opinion of the  
26   plaintiff's ability to function. Dr. Taylor discussed the  
27   plaintiff's social functioning, stating that "she is fearful of  
28   people" and wants to "minimize contact with people." Tr. 870.

1 Her social functioning was also relevant to Dr. Taylor's  
2 diagnoses of post-traumatic stress disorder, bi-polar disorder,  
3 and panic disorder with agoraphobia. Tr. 869. Dr. Taylor also  
4 discussed the plaintiff's concentration and persistence in his  
5 opinion, stating that the plaintiff had difficulty keeping orders  
6 straight when working as a waitress, and that he doubted she  
7 could perform the forty hours per week in a sustained,  
8 satisfactory way. Tr. 870. These were appropriate factors for  
9 Dr. Taylor to use in his opinion and the ALJ erred in using them  
10 as a basis for rejecting Dr. Taylor's opinion.

11 The ALJ also rejected Dr. Taylor's opinion that the  
12 plaintiff's mental impairments would likely keep her from  
13 sustaining full-time work because this conclusion was allegedly  
14 inconsistent with Dr. Taylor's discussion of "work which might be  
15 appropriate for the claimant in several months." Tr. 23. Dr.  
16 Taylor reported that the plaintiff "will probably look for a job  
17 as a Hotel/Motel maid." Tr. 870. Dr. Taylor went on to state  
18 that "she has a history of back problems and fears that working  
19 as a hotel maid would probably aggravate that problem." Tr. 870.  
20 Dr. Taylor's conclusion was that "some amount of work and some  
21 kinds of work activity are probably helpful for her... [h]owever,  
22 I am very doubtful that she can carry out a job requiring 40  
23 hours or more per week of sustained satisfactory performance, and  
24 not more than 2 days off per month for doctors' visits and other  
25 special needs." Tr. 870. The discussion of the plaintiff's  
26 intent to look for future or part-time work is not inconsistent  
27 with this conclusion. The ALJ erred in rejecting Dr. Taylor's  
28 opinion for alleged inconsistencies.

1 For the above reasons, the ALJ erred in rejecting Dr.  
2 Taylor's opinion that the plaintiff's mental impairments would  
3 likely keep her from sustaining full-time work.

### 4 3. Dr. Wicher's Opinion

5 The plaintiff argues that the ALJ implicitly rejected Dr.  
6 Wicher's opinion, because the ALJ's finding that the plaintiff  
7 was capable of sustained full time employment was inconsistent  
8 with Dr. Wicher's opinion. Plaintiff's Brief p. 22, Tr. 19. The  
9 defendant correctly states that Dr. Wicher noted that the  
10 plaintiff's psychological symptoms did not prevent the plaintiff  
11 from working in the past, and that Dr. Wicher believed that the  
12 plaintiff could continue to work successfully despite these  
13 difficulties. Defendant's Brief at 13, Tr. 342. However, both  
14 the defendant and the ALJ failed to note that although Dr. Wicher  
15 opined that by themselves the plaintiff's mental problems would  
16 not preclude her from returning to work, Dr. Wicher also stated  
17 that "[i]n combination with her physical limitations, her  
18 problems with emotional lability and the resultant concentration  
19 deficits and problems with persistence could certain (sic) make  
20 it more difficult for her to sustain gainful employment." Tr.  
21 342-343. The ALJ's findings disregarded this part of Dr.  
22 Wicher's opinion, and because the ALJ did not take the opinion  
23 into account in its entirety, the findings are inconsistent with  
24 the opinion. This inconsistency is an implicit rejection which  
25 the ALJ failed to give specific and legitimate reasons to  
26 support.

27 The ALJ erred in rejecting Dr. Wicher's opinion that  
28 plaintiff's combination of mental and physical problems would

1 make it difficult for her to sustain employment.

#### 2 4. Opinions Are Credited

3 Because the ALJ failed to give legitimate reasons for  
4 rejecting the opinions of the plaintiff's treating and examining  
5 physicians, the opinions are credited as a matter of law.  
6 Lester, 81 F.3d at 834 (quoting Hammock v. Bowen, 879 F.2d 498,  
7 502 (9<sup>th</sup> Cir. 1989)).

#### 8 5. Opinions Establish Disability

9 The plaintiff alleges that when the improperly rejected  
10 evidence is credited, it establishes that she is disabled, and  
11 therefore the court should remand her case for an award of  
12 benefits. An award of benefits is appropriate when: (1) the ALJ  
13 failed to give legally sufficient reasons for rejecting evidence;  
14 (2) no outstanding issues remain; and (3) it is clear the ALJ  
15 would be required to award benefits when the improperly rejected  
16 evidence is credited. Harman v. Apfel, 211 F.3d 1172, 1178 (9<sup>th</sup>  
17 Cir.), cert. denied, 531 U.S. 1038 (2000).

18 As discussed above, the first element is met in that the  
19 ALJ failed to give legally sufficient reasons for rejecting the  
20 opinions of the plaintiff's treating physicians. The second  
21 element is also met as no outstanding issues remain.

22 Finally, the third element is also satisfied. According to  
23 the vocational expert at plaintiff's hearing, a person whose  
24 concentration varied such that it was sometimes as much as  
25 markedly impaired would have problems performing and sustaining  
26 the jobs identified by the ALJ. Tr. 944-48. Drs. Taylor and  
27 Wicher opined that the plaintiff has limitations in her ability  
28 to concentrate and work at a sustained pace. Tr. 870, 342-343.

1 The vocational expert opined that if a person had to take  
2 periodic breaks outside the normal rest periods they would have  
3 difficulty sustaining employment. Tr. 949-951. Dr. Nolan opined  
4 that the plaintiff would have to take such periodic breaks due to  
5 her back pain. Tr. 835. Finally, the vocational expert opined  
6 that a worker would not be able to sustain employment if she was  
7 absent two or more days per month for doctors' visits or other  
8 special needs. Tr. 951. Dr. Taylor opined that the plaintiff  
9 would miss more than two days of work per month for such needs.  
10 Therefore, the opinion of the vocational expert, when considered  
11 along with the opinions of Drs. Nolan, Taylor, and Wicher,  
12 mandates a finding that the plaintiff is disabled.

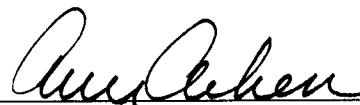
13 Because the criteria of Harmon v. Apfel is met, this court  
14 finds that an award of benefits is appropriate. Moreover,  
15 because the error found by this court allows a reversal of the  
16 ALJ's decision, the court declines to address plaintiff's  
17 remaining allegations of error.

#### 18 CONCLUSION

19 The Commissioner's decision is not based on substantial  
20 evidence, and is therefore reversed and remanded for payment of  
21 benefits.

22 IT IS SO ORDERED.

23 Dated this 21 day of June 2005.

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28 Ann Aiken  
United States District Judge